December Term, 1798.

RESPUBLICA *verſus* COBBET.

THE Defendant, being charged as a common libeller before THE CHIEF JUSTICE, was bound by recognizance to be of good behaviour, &c. and on a ſuppoſition, that he had broken the condition, by a continuance of his libellous publications, an action of debt was inſtituted upon the recognizance, in this court. At the time of his entering his appearance, however, he filed a petition, ſetting forth upon oath, that he was an alien, a ſubject of the King of *Great Britain*; and praying, that the ſuit might be removed for trial into the Circuit Court, upon the terms preſcribed by the 12th ſection of the judicial act. 1 *Vol. Swift's Edit. p.* 56. The removal being objected to, a rule to ſhew cauſe was granted; which was argued by *Ingerſoll* and *Dallas*, for the Commonwealth, and by *E. Tilghman*, *Lewis*, *Rawle*, & *Harper*, (of *South-Carolina*,) for the Defendant.

The argument embraced two propoſitions:—1ſt. Whether, in any caſe, a State can be compelled, by an alien, to proſecute her rights in the Circuit Court? 2d. Whether admitting the general juriſdiction of the Circuit Court, a State can be ſo compelled, in a caſe like the preſent?

1. For the Defendant, it was urged, that the preſent caſe came clearly within the conſtitutional inveſtment of judicial authority in the Federal Government, being a caſe between a State, and a ſubject of a foreign State; *Art.* 3. *ſ.* 2. that the 11th ſection of the judicial act, gives the Circuit Court "original cognizance, concurrent with the courts of the ſeveral States

1798. States, of all suits of a civil nature at common law or in equity, &c. where an alien is a party;" 1 *Vol. Swift's Edit. p.* 55. and that whatever doubt might be raised, whether this original jurisdiction embraced the case of a Plaintiff State upon a recognizance; yet, the act precludes all doubt when, in the nature of an appellate jurisdiction, it provides by the 12th section, for the removal of "a suit (not saying as before, a suit of a 'civil nature') commenced in any State court against an alien" The jurisdiction, thus expressly recognized by the Constitution and law, is founded on the policy of assuring to foreigners an independent and impartial tribunal;—a policy more entitled to be respected, than the mere dignity of the individual States, in the administration of justice. But neither the principle, nor the terms, of the Constitution will effect the present case: for, the principle goes no further than to prevent issuing any compulsory process, to render a State amenable at the suit of individuals; and the terms of the amendment, conforming to the principle, provide only, that "the judicial power of the *United States* shall not be construed to extend to "any suit in law or equity, *commenced or prosecuted against* "one of the *United States* by citizens of another State, or by "citizens, or subjects, of any foreign State." 3 *Vol. p.* 131, *Swift's Edit.* This is not a suit *against* a State, so the judicial power of the *United States* may still extend to it; but being a suit, in which a State is a party against an alien, the Supreme Court has, constitutionally, an original jurisdiction; which, however, does not preclude the exercise of jurisdiction, by way of appeal; particularly where the act of the State itself, in resorting to her own tribunal, leaves no alternative.

II. Nor is there any thing in the peculiar nature of the present suit, to bar the federal jurisdiction. It is an action of debt;—a suit of a civil nature, instituted by the same process, though in the name of the Commonwealth, as any other action to recover a debt; and not as a criminal prosecution for a breach of the law, or recognizance. If instead of applying for a removal, the Defendant had pleaded, the Plaintiff had demurred to the plea, and judgment had been given for the State, the Defendant would in this case, as in all cases of a civil nature, be entitled to a writ of error. To obviate, indeed, all cavil on the nature of the actions to be removed, the 12th section of the judicial act rejects epithets and qualifications of every description, using simply the term "a suit," which is, what the logicians would denominate, *genus generalissimum*, comprehending every form of action.—See 6 *Mod.* 132. 7 *T. Rep.* 357. 2 *Bl. C.* 341. 2 *Dall. Rep.* 358. 1 *Dall. Rep.* 393.

I. For

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I. For the commonwealth, it was anſwered, that if the preſent attempt was ſucceſsful, it would proſtrate the authority of the individual States; and render them, whenever a foreigner was an offender, and the offence was bailable, completely dependent upon the federal courts for the adminiſtration of criminal juſtice. But recognizances are a part of the proceedings in the exerciſe of a criminal juriſdiction; and wherever the principal queſtion attaches, it is a rule of law, that every incident follows. The caſe never could, indeed, be within the contemplation of the conſtitution, or law, as a ſubject of federal juriſdiction. Every goverment ought to poſſeſs the means of ſelf-preſervation; and no court can exiſt, without the power of bailing, binding to good behaviour, &c. It is abſurd and nugatory to ſay, a State Court may poſſeſs the power, but that a Federal Court, in the numerous inſtances of foreigners, is neceſſary to enforce it. Nor is the adverſe doctrine confined to the caſe of a recognizance like the preſent; but it equally applies to the caſes of a recognizance for the appearance of a defendant, or witneſs, and for anſwering interrogatories upon a contempt committed. Is it reaſonable to ſuppoſe, that ſuch an effect was intended to be produced, by the framers of the Conſtitution, or that it could long be tolerated by the people!

It is contended, the word "ſuit," is *genus generaliſſimum*, and embraces every ſpecies of action: but however logical the phraſe, the inference is certainly politically wrong. The powers of the general government extend no further than poſitive delegation; and, in relation to crimes, they are either ſpecified in the Conſtitution, or enacted in laws, made in purſuance of it. The State has, likewiſe, its penal ſanctions, more general and indefinite than thoſe of the union; every inhabitant owing obedience to its laws. If an alien, as well as if a citizen, commits murder, burglary, arſon, or larceny, in *Pennſylvania*, he is puniſhable by indictment excluſively in the State Courts: And yet an indictment, or information, is in legal phraſeology, "a ſuit:" 4 *Bl. C.* 298. 2 *Wood. Lect.* 551. 2 *Com. Dig.* 227. As are actions on penal ſtatutes, whether brought by a common informer, or by the State. If, then, the word "ſuit" is ſo comprehenſive, what is to prevent an alien from transferring an indictment from the State to the Federal Court?

But the truth is, that this is not a ſuit of a civil nature; and, therefore, not within the view of the Conſtitution, or of the act of Congreſs. Speaking of indictments and informations, they would be called criminal proſecutions: And this ſuit though not, ſtrictly, a criminal proſecution, is a ſuit of a criminal

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II. But a State cannot be, and never could have been, compelled, by an alien, to proſecute her rights in a Circuit Court. The Conſtitution contemplates the ſubjects, and the tribunals, for the exerciſe of the judicial authority of the Union. The caſes of public miniſters and individual States, are veſted, as matter of *original* juriſdiction, in the Supreme Court; and even if the word *original* does not mean *excluſive*, the courts of the reſpective States poſſeſſed at the time of framing the conſtitution, a concurrent juriſdiction, by which the proviſion may be ſatisfied. The juriſdiction of the State courts has never ſince been taken away; but as the Conſtitution does not give a concurrent juriſdiction to the Circuit Court, it is, at leaſt, incumbent on the Defendant's counſel to ſhew, by expreſs words, that ſuch a juriſdiction is given in the act of Congreſs.

In diſtributing among the Federal Courts their reſpective portions of the judicial authority, Congreſs has declared, in the 13th ſection, "that the Supreme Court ſhall have excluſive "juriſdiction of all controverſies of a civil nature, where a "State is a part, except between a State and its citizens; "and except alſo been a State and citizens of other States, or "aliens, in which latter caſe it ſhall have *original*, but not "*excluſive*, juriſdiction." When theſe exceptions were made, the concurrent juriſdiction of the State Courts exiſted to ſatisfy them; and the act of Congreſs does not, in any other ſection, name, or deſcribe, the caſe of a State, either upon the principle of an original, excluſive, or appellate, juriſdiction. The principal policy ſuggeſted as to aliens, was, likewiſe, anſwered; for, they might all have ſued in the Supreme Court; and the caſe of one State againſt a citizen of another State, is put on the ſame footing with the caſe of a State againſt an alien. By this ſection, therefore, the proviſion in the conſtitution is effectuated; and we muſt preſume, that if a State was meant to be included in any grant of juriſdiction to an inferior Court, the meaning would be clearly expreſſed, and not left to doubtful implication.

There

There are, then, no words, in creating the juriſdiction, of the Circuit Court, that expreſsly include a State: and, indeed, it has almoſt been conceded, that the caſe is not within the 11th ſection, of the judicial act. It is to be ſhewn, however, that if it is not within the 11th ſection, it cannot be embraced by the 12th ſection. The *concurrent* juriſdiction given by the 11th ſection to the Circuit Court, refers to the State Courts, and not to the Supreme Court; and the generality of the terms might, upon the oppoſite conſtruction, be extended to caſes evidently not included in the reaſon of the proviſion, or excluded by other parts of the law;—to ſuits below the value of 500 dollars, to ſuits for coſts, and to ſuits between aliens. It is inſiſted, however, to be enough to give the juriſdiction, that an *alien* is a party. But *expreſſio unius eſt excluſio alterius*; and it would violate another rule of law, to embrace the caſe of a ſuperior, a State, by merely naming the caſe of an inferior, a foreign individual. In the Conſtitution, and in the 13th ſection of the judicial act, the caſes of an alien, and of a citizen of another State, are placed on the ſame footing, becauſe, it is plain, that their caſes are within the ſame policy: but, if the adverſe doctrine is correct, the principle is abandoned in the 11th ſection; for, the juriſdiction will affect the ſuit of a State where an alien is a party, though it will not affect the ſuit of a State, where the citizen of another State is a party. Alien party, means party Plaintiff, as well as Defendant; and, therefore, if the juriſdiction is not limitted to private ſuits between individuals, what was there, before the amendment of the Conſtitution, to prevent an alien from ſuing a State in the Circuit Court? And yet was ſuch an attempt ever made, or would ever ſuch an attempt have been tolerated? 1799.

Theſe conſiderations, and the dignity of the party, muſt evince that the conſtitution and law intended to veſt in the Supreme Court alone, an original juriſdiction in the caſe of States, unleſs the States themſelves voluntarily reſort to ſtate tribunals, which are, therefore, left with a concurrent authority. Neither in the conſtitution, nor the law, is there an expreſs delegation of a concurrent authority to the Circuit Courts. For, although it is ſaid, that the twelfth ſection meant to enlarge the juriſdiction of the Circuit Courts, beyond the boundaries preſcribed in the eleventh ſection; yet the ſections are in *pari materia*; they ſpeak of the ſame parties; they refer to the ſame value of the matter in controverſy; and, in ſhort, the twelfth ſection only provides a mode of transferring from the State Court to the Federal Court, ſuch ſuits, in which an alien is made a Defendant, as he could have originally brought there in the

1798. the character of a Plaintiff: In the character of a Plaintiff he could never have ſued a State in the Circuit Court; and ſuch is the uniform opinion of all who have ever commented on the Conſtitution, or expounded the Law. 2. *Federaliſt*, 317. 318. 323. 327. 2. *Dall. Rep.* 436. 299. 402. 415.

But, ſurely, the amendment to the Conſtitution muſt put an end to every difficulty. It ordains that "the judicial power "of the *United States* ſhall not be conſtrued to extend to any "ſuit in law, or equity, commenced or proſecuted againſt one "of the *United States*, by citizens of another State, or by "citizens or ſubjects of any foreign State." (3. *Vol.* 131. *Swift's Edit.*) The language of the amendment, indeed, does not import an alteration of the Conſtitution, but an authoritative declaration of its true conſtruction. Then, there are only two caſes in which a State can be affected—1ſt. Where ſhe is Plaintiff,—2d. Where ſhe is Defendant: the amendment declares, that ſhe ſhall not be affected as a Defendant; and as a Plaintiff ſhe can never be affected but by her own act; ſince, there is no Conſtitutional injunction, that ſhe ſhall ſue in a Federal Court. The miſchief which was apprehended in allowing States to be ſued in the Supreme Court, is not greater than the miſchief in allowing them to be forced to ſue in the Circuit Court: the proceſs in both caſes is, alike, compulſory; and many interlocutory deciſions, as well as final judgments, might be pronounced, to which a State Plaintiff would be as averſe, as a State Defendant. If ſhe does not recover, ſhall ſhe be condemned in coſts? If there is a ſet-off pleaded, and a verdict againſt her, can the Defendant maintain a *ſcire facias*, under the *Pennſylvania* act of Aſſembly, which the act of Congreſs recognizes as the rule of deciſion? 1. *Vol.* 65. *(Dall. Edit.)* Or if ſhe recovers as a Plaintiff, in the Circuit Court, can ſhe be converted into a Defendant in the Supreme Court, upon a Writ of Error? Such is the labyrinth, in which the oppoſite doctrine is involved!

After adviſement, the unanimous opinion of THE COURT was delivered by THE CHIEF JUSTICE, in the following terms.

M'KEAN, *Chief Juſtice.* This action is brought on a recognizance to the commonwealth of *Pennſylvania*, for the good behaviour, entered into by the Defendant before me. The Defendant has appeared to the action, and exhibited his petition to the Court, praying that the juriſdiction thereof be tranſferred to the Circuit Court of the *United States, as he is an Alien, and a ſubject of the King of Great Britain.* His right to this claim of juriſdiction is ſaid to be grounded on the 12th ſection of the act of Congreſs, entitled "An act to eſtabliſh the Judicial

Judicial Courts of the *United States*, passed the 24th of *September* 1789, in the first clause of which section it is enacted, that if a suit be commenced in any State Court against an alien, &c. and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, on a petition of the Defendant, and a tender of bail to appear in the Circuit Court, &c. it shall be the duty of the State Court to accept the surety, and proceed no further in the case, &c. 1798.

Previous to the delivery of my opinion in a cause of such importance, as to the consequences of the decision, I will make a few preliminary observations on the constitution and laws of the *United States* of *America*.

Our system of government seems to me to differ, in form and spirit, from all other governments, that have heretofore existed in the world. It is as to some particulars *national*, in others *federal*, and in all the residue *territorial*, or in districts called States.

The divisions of power between the national, federal, and state governments, (all derived from the same source, the authority of the people) must be collected from the constitution of the *United States*. Before it was adopted, the several States had absolute and unlimited sovereignty within their respective boundaries; all the powers, legislative, executive, and judicial, excepting those granted to Congress under the old constitution: They now enjoy them all, excepting such as are granted to the government of the *United States* by the present instrument and the adopted amendments, which are for particular purposes only. The government of the *United States* forms a part of the government of each State; its jurisdiction extends to the providing for the common defence against exterior injuries and violence, the regulation of commerce, and other matters specially enumerated in the constitution; all other powers remain in the individual states, comprehending the interior and other concerns; these combined, form one complete government. Should there be any defect in this form of government, or any collision occur, it cannot be remedied by the sole act of the Congress, or of a State; the people must be resorted to, for enlargement or modification. If a State should differ with the *United States* about the construction of them, there is no common umpire but the people, who should adjust the affair by making amendments in the constitutional way, or suffer from the defect. In such a case the constitution of the *United States* is federal; it is a league or treaty made by the individual States, as one party, and all the States, as another party. When two nations differ about the meaning of any clause, sentence, or word in a treaty, neither has an exclusive right to decide it;

1798. they endeavour to adjuſt the matter by negociation, but if it cannot be thus accompliſhed, each has a right to retain its own interpretation, until a reference be had to the mediation of other nations, an arbitation, or the fate of war. There is no proviſion in the conſtitution, that in ſuch a caſe the Judges of the Supreme Court of the *United States* ſhall control and be concluſive: neither can the Congreſs by a law confer that power. There appears to be a defect in this matter, it is a *caſus omiſſus*, which ought in ſome way to be remedied. Perhaps the Vice-Preſident and Senate of the *United States*; or commiſſioners appointed, ſay one by each State, would be a more proper tribunal than the Supreme Court. Be that as it may, I rather think the remedy muſt be found in an amendment of the conſtitution.

I ſhall now conſider the caſe before us. It is an action brought in the name of the commonwealth of *Pennſylvania*, againſt *an alien*, a *Britiſh* ſubject. By the expreſs words of the ſecond ſentence of the 2nd ſection of the 3d Article of the conſtitution of the *United States*, in ſuch an action the Supreme Court ſhall have original juriſdiction; whereas it is now prayed by the Defendant, that original juriſdiction be given to the Circuit Court. From this, it would reaſonably be concluded, that the Congreſs, in the 12th ſection of the judicial law, did not contemplate an action wherein a State was Plaintiff, though an alien was Defendant, for it is there ſaid, "that if a ſuit be commenced in any State Court againſt an alien, &c." as it does not mention by a State, the preſumption and conſtruction muſt be, that it meant by a citizen. This will appear pretty plain from a peruſal of the 11th ſection of the ſame act, where it is enacted, that the Circuit Courts ſhall have original cognizance, concurrent with the Courts of the ſeveral States, of all ſuits of a civil nature, of a certain value, where the *United States* are Plaintiffs or Petitioners, or where an alien is a party. This confines the original cognizance of the Circuit Courts, concurrent with the Courts of the ſeveral States, to civil actions commenced by the *United States*, or citizens againſt aliens, or where an alien is a party, &c. and does not extend to actions brought againſt aliens by a State, for of ſuch the Supreme Court had, by the conſtitution, original juriſdiction. I would further remark, that the juriſdiction of the Circuit Courts is confined to actions of a civil nature againſt aliens, and does not extend to thoſe of a criminal nature; for although the word "*ſuit*" is uſed generally in the 12th ſection, without expreſſing the words "*of a civil nature*," yet the ſlighteſt conſideration of what follows, manifeſtly ſhews that no other ſuit was meant; for the matter in diſpute muſt exceed five hundred dollars in value,

value, ſpecial bail muſt be given, &c. terms applicable to actions of a civil nature only. 1798.

Let us now conſider, whether this ſuit againſt *William Cobbet* is of a civil or criminal nature. It is grounded on a recognizance for the good behaviour entered into before the Chief Juſtice of this State. This recognizance, it muſt be conceded, was taken to prevent criminal actions by the defendant, in violation of the peace, order, and tranquility of the ſociety; it was to prevent crimes, or public wrongs, and miſdemeanors, and for no other purpoſe. It is evidently of a *criminal* nature, and cannot be ſupported, unleſs he ſhall be convicted of having committed *ſome crime*, which would incur its breach ſince its date, and before the day on which the proceſs iſſued againſt him. Beſides, a recognizance is a matter of *record*, it is in the nature of a *judgment*, and the proceſs upon it, whether a *ſcire facias* or ſummons, is for the purpoſe of carrying it into execution, and is rather *judicial* than *original*; it is no farther to be reckoned an original ſuit, than that the Defendant has a right to plead to it: it is founded upon the recognizance, and muſt be conſidered as flowing from it, and partaking of its nature; and when final judgment ſhall be given the whole is to be taken as one record. It has been well obſerved by the attorney general, that by the laſt amendment, or legiſlative declaration of the meaning of the Conſtitution, reſpecting the juriſdiction of the courts of the *United States* over the cauſes of States, it is ſtrongly implied, that States ſhall not be drawn againſt their will directly or indirectly before them, and that if the preſent application ſhould prevail this would be the caſe. The words of the declaration are: "The judicial power of the *United States* ſhall not be conſtrued to extend to any ſuit in law or equity commenced or proſecuted againſt one of the *United States*, by citizens of another State, or by citizens or ſubjects of any foreign State." When the judicial law was paſſed, the opinion prevailed that States might be ſued, which by this amendment is ſettled otherwiſe.

The argument *ab inconvenienti* is alſo applicable to the conſtruction of this ſection of the act of Congreſs. Can the Legiſlature of the *United States* be ſuppoſed to have intended (granting it was within their conſtitutional powers) that an alien, reſiding three or four hundred miles from where the Circuit Court is held, who has, from his turbulent and infamous conduct in his neighbourhood, been bound to the good behaviour by a magiſtrate of a ſtate, ſhould, after a breach of his recognizance and a proſecution for it commenced, be enabled to remove the proſecution before a Court at ſuch a diſtance, and held but twice in a year, to be tried by a jury, who

1798. who know neither the perſons, nor characters, of the witneſſes, and conſequently are unqualified to try their credit; and to oblige the proſecutor and witneſſes to incur ſuch an expence of time and money, in order to prove that he had committed an aſſault, or any other offence that would amount to a violation of it? If ſo, ſuch a recognizance, though it would operate as a ſecurity to the public againſt a citizen, would be of little avail againſt an alien. It cannot be conceived, that they intended to put an alien in a more favorable ſituation than a citizen in ſuch a caſe, and by difficulties thrown in the way to diſcourage and weaken, if not defeat the uſe of, a reſtraint, found often to be very ſalutary in preſerving the peace and quiet of the people. Many other inconveniences have been mentioned by the counſel, which I ſhall not repeat. If, therefore, any other conſtruction can be made it ought to prevail.

Upon the whole, our opinion is, that where a *State* has a controverſy with an *alien* about a contract, or other matter of a *civil nature*, the Supreme Court of the *United States* has original juriſdiction of it, and the circuit or diſtrict courts have nothing to do with ſuch a caſe. The reaſon ſeems to be founded in a reſpect for the dignity of a State, that the action may be brought in the firſt inſtance before the higheſt tribunal, and alſo that this tribunal would be moſt likely to guard againſt the power and influence of a ſtate over a foreigner. But that neither the conſtitution nor the congreſs ever contemplated, that any court under the *United States* ſhould take cognizance of any thing ſavouring of *criminalty againſt a State*: That the action before the court is of a *criminal nature* and for the puniſhment of a crime againſt the State: That yielding to the prayer of the petitioner would be highly inconvenient in itſelf and injurious in the precedent: And that cognizance of it would not be accepted by the Circuit Court, if ſent to them; for even conſent cannot confer juriſdiction. For theſe reaſons, and others, omitted for the ſake of brevity, I conclude, the prayer of *William Cobbet* cannot be granted.

The Petition rejected.

CAMBERLING